

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

In re:

No. 00-16329

DON L. NUNLEY
CINDY K. NUNLEY

Chapter 7

Debtors

MEMORANDUM AND ORDER

The debtors in this chapter 7 case have filed a petition (motion) to approve a reaffirmation agreement with Union Planters Bank, whose debt is secured by the debtors' residence. The motion alleges that through inadvertence the reaffirmation agreement was not filed with the court before the debtors received a discharge on April 2, 2001.

The discharge was actually entered on March 26, 2001, and a later statement in the motion recites this fact. The motion also alleges that the agreement was made before the debtors received notice of the discharge on April 20, 2001. These facts suggest that the earlier allegation is a misstatement. The debtors' lawyers knew the correct date of the discharge was March 26, not April 2. Furthermore, "April 2, 2001" makes sense as a typographical error for "April 20, 2001." As written, the earlier allegation is that the reaffirmation agreement was inadvertently not filed before the discharge on April 2, 2001. If the court's reasoning

is correct, the correct allegation is that an agreement inadvertently was not filed before the debtors received notice of the discharge on April 20, 2001.

Section 524 of the Bankruptcy Code sets out two methods of creating an enforceable reaffirmation agreement. The first and most common method applies when the debtor is represented by an attorney during negotiation of the agreement, and the court does not hold discharge hearings. 11 U.S.C. § 524(c) & (d). For a reaffirmation agreement to be effective, the statute requires that:

- (1) The agreement must be made before the discharge is entered.
- (2) The agreement contains the two clear and conspicuous notices required by § 524(c)(2).
- (3) The agreement is filed with the court.
- (4) The agreement is accompanied by the attorney's affidavit or declaration required by § 524(c)(3).

This procedure makes the reaffirmation agreement effective, but the debtor can rescind it within 60 days after the filing of the agreement or the entry of the discharge order, whichever is later. 11 U.S.C. § 524(c)(2)(A) & (c)(4).

The other method applies when the debtor is not represented by an attorney during negotiation of the reaffirmation agreement. There is no attorney's affidavit. Instead, the court is required to hold a hearing on approval of the

reaffirmation agreement. The court hearing essentially takes the place of the attorney's advice, though court approval also requires a finding that the agreement is in the best interest of the debtor. 11 U.S.C. § 524(c)(5), (c)(6) & (d).

When court approval is required, Rule 4008 imposes a deadline on filing a motion for approval of the reaffirmation agreement. The motion must be filed before or at the hearing. The hearing can be held up to 30 days after entry of the discharge order. *Fed. R. Bankr. P.* 4008.

This is the only deadline in the bankruptcy rules with regard to reaffirmation agreements. Neither § 524 nor the Bankruptcy Rules require a reaffirmation agreement to be filed before the discharge is entered. Section 524 requires the agreement to be made before the discharge is entered. It does not say the agreement must be filed with the court before the discharge is entered.

The statute does not explain what happens in a third scenario: the debtor is represented by an attorney during negotiation of the reaffirmation agreement, but the attorney refuses to sign an affidavit or declaration that the agreement will not impose an undue hardship on the debtor or a dependent of the debtor. The statute does not provide for a court hearing at which the court could still approve the agreement. If no court hearing is possible, the debtor's attorney has veto power over a reaffirmation agreement when he takes part in the negotiation.

The alternative is to allow a hearing at which the court might approve the agreement despite the attorney's opposition. *Collier on Bankruptcy* proposes this approach. 9 Lawrence P. King, et al., *Collier on Bankruptcy* ¶ 4008.05.

Court approval of a reaffirmation agreement is expressly required (1) when the debtor is not represented by an attorney in the bankruptcy case, or (2) when the debtor is represented by an attorney in the bankruptcy case, but the attorney did not represent the debtor during negotiation of the reaffirmation agreement. 11 U.S.C. § 524(c)(5), (c)(6) & (d). Court approval may also be possible when the debtor is represented by an attorney during negotiation of the agreement, but the attorney will not sign the affidavit or declaration required by § 524(c)(2). Court approval is neither required nor allowed in other situations.

If the purpose of the debtors' motion is to make the reaffirmation agreement legally effective even though it does not meet the requirements of § 524, the court cannot do that. *In re Whitmer*, 142 B.R. 811 (Bankr. S. D. Ohio 1992).

The motion is unclear as to whether the debtors are seeking a ruling that the reaffirmation agreement was made before the discharge. To be effective, a reaffirmation agreement must be made before the discharge; it need not be filed before the discharge. The allegations of the motion suggest the agreement was made after the discharge, but the motion does not concede this, and the reaffirmation agreement was not filed with the motion. Therefore, the court can

make no ruling at this time on when the agreement was made. *In re Lebeau*, 247 B.R. 537 (Bankr. M. D. Fla. 2000) (as when an agreement is “made”).

An order has been submitted to the court, signed by counsel for the debtors and Union Planters Bank, as well as the Chapter 7 Trustee, approving the reaffirmation. As previously indicated, court approval is neither required nor allowed. Accordingly,

It is ORDERED that the Motion For Approval of Reaffirmation Agreement After Discharge is DENIED.

ENTER:

[entered 6-6-01]

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE